(2) (4)

Nos. 86-509 and 86-564

In The

Supreme Court of The United States

October Term, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

v.

BEATY MAE GILLIARD, et al.,

Appellees.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, et al.,

Appellants,

v.

BEATY MAE GILLIARD, et al.,

Appellees.

On Appeals From The United States District Court For The Western District of North Carolina

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Does Section 402(a)(38) of the Social Security Act authorize state officials to require non-needy children to become welfare recipients and forfeit their child support in order for their indigent half-siblings to receive Aid to Families with Dependent Children?

2. If Section 402(a)(38) of the Social Security Act does authorize such action on the part of the state officials, is such a procedure unconstitutional?

3. Where state officials knowingly and deliberately violate a valid federal injunction, does the Eleventh Amendment preclude the federal courts from ordering state officials to return funds improperly taken or withheld in violation of that injunction?

4. Should Hans v. Louisiana, 134 U.S. 1 (1890), be overruled?

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MOTION TO AFFIRM

The jurisdictional statements in these appeals raise two distinct sets of issues, only one of which warrants plenary consideration by this court.

The first issue, raised by both the federal and state appellants, concerns the meaning and constitutionality of section 402(a)(38) of the Social Security Act. Appellees agree with the decision of the District Court that section 402(a)(38), as construed by that court, is unconstitutional. Because, however, the questions raised by appellants as to the meaning and validity of section 402(a)(38) are not

unsubstantial, we agree that the Court should note probable jurisdiction in the federal appeal, and as to question number 1 in the state appeal.

The state also seeks review of a 1986 order of the District Court directing the state to return funds unlawfully taken or withheld from appellees in violation of a 1971 injunction issued by that court. Because that aspect of the 1986 order is clearly correct, and does not turn on the construction or validity of section 402(a)(38), appellees move, pursuant to Rule 16, that the relevant portion of that order be summarily affirmed.

STATEMENT OF THE CASE

A. Summary of The Proceedings

In 1971, the District Court for the Western District of North Carolina entered a classwide injunction which prohibited the state from reducing Aid to Families with Dependent Children (AFDC) payable to eligible children by the amount of legally-restricted child support income received by another child in the household. The District Court decision was affirmed by this Court. Gilliard v. Craig, 331 F. Supp. 587 (1971) aff'd without opinion, 409 U.S. 807 (1972). In October, 1984, without returning to the District Court to ask that the injunction be lifted, the defendants adopted a policy in direct violation of the injunction. Members of the plaintiff class moved for enforcement of the injunction in May, 1985.

The state defendants, Phillip J. Kirk, Secretary of the North Carolina Department of Human Resources and C. Barry McCarty, Chairman of the North Carolina Social

Services Commission, did not move for Relief from Judgment until July, 1985, finally asking the court to relieve them from the terms of the injunction on the grounds that newly-issued regulations of the U.S. Department of Health and Human Services required the implementation of the resurrected income-counting policy. They filed a Third-Party Complaint against Secretary Bowen asking that the federal government share in any liability they suffered as a result of the violation. The Secretary responded that his new regulations were required by an amendment to the Social Security Act, Section 402(a)(38), passed as part of the Deficit Reduction Act of 1984 (DEFRA).

In May, 1986, the District Court held that the state was in violation of the 1971 injunction and denied its Motion for Relief from Judgment. Pursuant to the plaintiff's Motion for Further Relief, the court ordered the state to pay to the class members all the monies withheld as a result of the violation of the order. In addition, the court refused to lift the injunction prospectively, finding that the statute relied on by the state effects a taking of property without just compensation. The court also held that the statute violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Gilliard v. Kirk, 633 F. Supp. 1529 (W.D.N.C. 1986).

B. Statutory and Regulatory Framework

Aid to Families with Dependent Children (AFDC) is a joint state-federal program authorized by the Social Security Act to provide financial assistance to needy depen-

dent children and their caretaker relatives. 42 U.S.C. § 601 et seq.; Heckler v. Turner, 470 U.S. 184 (1985). The federal government reimburses participating states for a portion of the funds they expend on eligible recipients; in turn, the states must administer their assistance programs pursuant to state plans in conformity with applicable federal statutes and regulations. Id. Children eligible to receive AFDC benefits are those who are deprived of the support or care of at least one parent and who meet the financial need criteria. 42 U.S.C. § 606(a).

Prior to the passage of the Deficit Reduction Act in 1984, a parent applying for AFDC could designate which of her children needed assistance. The state agency counted all the income and resources of the persons claiming aid in determining their financial need for assistance. 42 U.S.C. § 602(a)(7). In considering that income and resources, the state allowed certain exemptions and deductions and determined the monthly countable income of those applying for benefits. If that income was less than the state's payment standard, the applicants were eligible for AFDC assistance.[1]

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[1] The Jurisdictional Statement of the federal appellants incorrectly states at page 3 that the amount of benefits paid to the family is based upon the difference between the family's income and [the standard of need.] The state sets a "standard of need" to reflect its judgment of the minimum subsistence level in the state. 42 U.S.C. § 602(a)(23). The AFDC payment in North Carolina is fifty percent of the standard of need. See 1985 N.C. Sess. Laws Chapter 479. Thus, the AFDC payment is the difference between the unit's income and fifty percent of the state's minimum subsistence level.

A parent's option to exclude certain children from the welfare grant was particularly important in households containing children of different fathers. When the father of a particular child provided adequate support for him, the child would not need public assistance. Because his needs were taken care of, he would not be a member of the welfare grant nor would his income and resources (i.e. his child support) be considered in the determination of the needs of the other children claiming aid. This allowed the mother to act consistently with state law, which requires her to use child support exclusively for the benefit of the child for whom it was paid. See N.C. Gen. Stat. § 50-13.4; Goodyear v. Goodyear, 257 N.C. 374 (1962).

The Deficit Reduction Act of 1984 included an amendment to the Social Security Act affecting this system. The amendment requires that a state AFDC plan must:

> (38) provide that in making the determination under paragraph (7) [42 U.S.C. § 602(a)(7)] with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) [42 U.S.C §§ 601 et seq.] include -
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 406(a) [42 U.S.C. § 606(a)], if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 205(j) [42 U.S.C. § 405(j)], in the case of

> benefits provided under title II [42 U.S.C. §§ 401 et seq.];

Pub. L. No. 98-369, § 2640, 98 Stat. 494, 42 U.S.C. § 602 (a)(38). With its many cross references and complex construction, this section's meaning has engendered much dispute.[2] Secretary Bowen of the United States Department of Health and Human Services and Secretary Kirk of the North Carolina Department of Human Resources have interpreted this statute to require what they call "the standard filing unit." The federal regulations provide:

> For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:
>
> (A) Any natural or adoptive parent...; and...
> (B) Any blood-related or adoptive brother or sister.

45 C.F.R. § 206.10(a)(1)(vii) (1985). The state regulations are similar:

> Standard Filing Unit
>
> A. The parent and all minor children who are brothers and sisters, including half-brothers and sisters, and who are living together must be included in the same assistance unit unless:

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[2] See, e.g., Gorrie v. Heckler, 624 F. Supp. 85 (D.Minn. 1985) appeal pending, No. 85-5394-MN (8th Cir.); White Horse v. Heckler, 627 F. Supp. 848 (D.S.D. 1985) appeal pending, Nos. 85-5005, 85-5006SD (8th Cir.); Johnson v. Cohen, No. 84-6277 (E.D. Pa. Jan. 10, 1986) appeal pending; Nos. 86-1101, 86-1107, 86-1149 (3d Cir.); Maryland Dept. of Human Resources v. United States Dept. of Health and Human Services, Nos. M-86-605, M-86-604 (D. Md. Apr. 22, 1986) appeals pending, Nos. 86-3076, 86-3083 (4th Cir.).

1. The parent or child is an SSI recipient, or
2. The parent or child does not meet all eligibility factors with the exception of income and reserve. Do not exclude a parent or child because of the amount of income or reserve he has.

Section 2360 III A, North Carolina AFDC Manual.

In other words, the two Secretaries have interpreted the amendment, which by its literal terms requires only that the income and resources of these co-resident siblings be "considered" in the determination of the financial need of the dependent child claiming aid, to require these others to be a part of the AFDC application unit. The standard filing unit policy thus draws into the welfare system a whole group of children who were formerly excluded because their needs were being met by one or both parents.

Having subsumed these supported children into the AFDC unit, the defendants then require of them all that they require of AFDC recipients. Among these requirements is the requirement that all rights to child support be assigned to the state as a condition of AFDC eligibility. 42 U.S.C. § 602(a)(26)(A). This is how the deficit reduction is accomplished. By requiring children who have adequate support to join the welfare system, the defendants capture this support. Since the amount paid out in AFDC benefits for these additional children is considerably less than what the children pay in through their assignment,

actual government expenditures are reduced.[3]

C. Summary of The Facts

The five class members who filed the 1984 Motion for Further Relief submitted affidavits presenting examples of the operation and effect of the standard filing unit rule. Dianne Thomas is the mother of two children, Crystal and Sherrod, who each have a different father. Prior to the implementation of the standard filing unit rule, Ms. Thomas received AFDC of $194 per month for Crystal. Pursuant to an agreement between Ms. Thomas and Sherrod's father, she received $200 per month in child support for Sherrod and no AFDC. In October, 1984, the AFDC office informed Ms. Thomas that her AFDC for Crystal would be terminated unless she filed a new application which included both children. She was told that as part of the new application, she would have to assign Sherrod's child support rights to the state, and she would be entitled to an AFDC grant of $223 for both children. Fifty dollars of the support collected on his behalf would be returned to Sherrod and the state would keep

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[3] The government does not save the full amount of the child support because there is a small incremental increase in the AFDC payment when the child is added and $50 in child support is disregarded as countable income. 42 U.S.C. § 657(b)(1). For example, a North Carolina family with three children and a single parent currently receives $269 per month in AFDC benefits. If a fourth child were required to be added to the unit, the incremental AFDC increase would be $25. If that fourth child were receiving $200 per month in child support and assigned it to the state, the government savings would be $125 - the AFDC grant would be increased to $294, but it would be offset by $150 of the $200 in support received. Whereas the government was spending $269 a month for the three-child household, it would now be spending just $144 for the four-child household.

the rest. The consequence for Ms. Thomas would be that from having $394 available to support her two children, she would have only $273.

Ms. Thomas initially refused to add Sherrod to the AFDC unit because of violent objections from Sherrod's father to having his son put on welfare. Consequently, Crystal's AFDC was cut off. Several months later, however, Ms. Thomas was facing utility terminations and was unable to purchase clothing and other necessities for Crystal. She felt she had no choice but to again apply for AFDC, and submit to the requirement that she add Sherrod to the application and assign his rights to child support to the state. Upon learning of Ms. Thomas's decision to put his child on welfare, Sherrod's father stopped paying the support he had been regularly providing, and stopped his regular visitation with his son. Sherrod developed behavioral problems and his school performance declined, both of which his mother attributed to his father's withdrawal from him. With the support rights assigned, the county sued Sherrod's father for support; a court order now requires him to pay $87 per month to the Clerk of Court. See Memorandum of Decision, Jurisdictional Statement of Kirk et al., A-13 thru A-17 (hereinafter, State J.S.).

Mary Medlin has four children. No legal paternity has been established for the two older boys, and they have never received child support. Bobby Harrington is the father of 10-year-old Karen, and prior to the operation of the standard filing unit, had signed a Voluntary Support

Agreement pursuant to which he was paying $200 per month as support for her. James Richardson, the father of one-year-old Jermaine, voluntarily supported his child pursuant to an oral agreement with Ms. Medlin. He purchased necessities for his child, paid a portion of Ms. Medlin's household bills and provided $50 a month in cash support. Thus, Ms. Medlin supported the two older boys with AFDC and the two younger children with their support.

When the standard filing unit went into effect, the AFDC was terminated because the support for the two younger children exceeded the potential AFDC payment for the four-child unit required by the standard filing unit rule. Unable to make ends meet and facing objections from the two supporting fathers that their money was being used to support children for whom they had no duty, Ms. Medlin reluctantly agreed to transfer custody of her daughter Karen to Mr. Harrington so that the girl could be properly supported. The remaining three children then became eligible for an AFDC grant. Because Jermaine was included as an AFDC recipient, though, Ms. Medlin had to assign his support rights to the state. Jermaine's father, Mr. Richardson, was then asked by the county (which carries out the state child support collection) to agree to pay $165 per month through the Clerk of Court's office instead of providing direct support. In response to Mr. Richardson's questioning, the county agent confirmed that only $50 of that $165 would go directly to his son, and the remaining $115 would be retained by the state to offset its AFDC expenditures for Jermaine and his

half-brothers and sisters. Mr. Richardson refused to agree to such an arrangement, because he wished to continue supporting his son directly and did not think he should be required to support the others. The state then brought a criminal action for non-support against him. He eventually agreed to pay $139 in child support through the Clerk of Court's office to avoid a criminal conviction. Id. at A-17 A-20.

The other appellees present similar cases. The father of two of the five children of Arvis Waters is ordered to pay support in the amount of $193 per month by the Family Court of New York; his wages are garnished to assure regular payments. The father of her other three children provides no support and Ms. Waters had received AFDC for just those three prior to the implementation of the standard filing unit. To avoid having no income at all for the older three, Ms. Waters was forced to put them all on the welfare grant after October, 1984. The supported children saw their income drop by 25 percent. Suddenly, their mother was unable to afford proper shoes, diapers or cab fare to the health clinic. Because New York collects several months of support before mailing it to North Carolina, and North Carolina pays only one "$50 disregard" for each lump sum received, the children are often deprived of even this small portion of their support. Thus, Ms. Waters frequently has just a welfare check to support all her children, despite the $193 in support that is being paid. Id. at A-22 thru A-28.

Diane Jefferys, mother of four, suffered like difficulties. Her husband and father of two of her children had been paying $204 each month in support pursuant to a local court order and Ms. Jefferys received AFDC of $223 per month for her other two children. When the standard filing rule was imposed on the family, the support was assigned to the state and the whole group was included in the $294 AFDC check. Mr. Jefferys stopped paying support because of his objections to the assignment of his support to the state. The resultant drop in income led to the family's eviction, and a significant drop in their already meager standard of living. Id. at A-28 thru A-30.

The fifth appellee, Joyce Miles, experienced the same sort of financial decline for her supported children. When her two teenage girls lost the court-ordered support of their father, their mother became unable to buy clothing, shoes and other items she had formerly been able to afford for them from the child support they received. Their inclusion in the AFDC unit reduced them to a welfare-level standard of living (i.e., at fifty percent of the state standard of need, see note 1, supra) rather than the higher standard they had enjoyed when they were the recipients of the support paid by their father.

The experiences of these families demonstrate clearly the effects of the standard filing unit rule. By forcing non-needy children into the AFDC assistance unit and taking their child support through the assignment system, AFDC

expenditures for needy children are reduced by the child support of the non-needy children. If the child support for one child in the unit exceeds the maximum grant amount for the whole unit, the assistance is terminated for everyone, even though there may be several children whose absent parents provide no support and who have no other income. The rule applies despite court orders and contracts requiring that the child support be used solely for the benefit of a particular child. The rule applies despite the actual use of the child support for the individual needs of the child for whom it is paid. And finally, the rule applies despite the wishes of both parents that a child remain independent of welfare.

D. The 1986 District Court Decision

The District Court viewed North Carolina's implementation of the standard filing unit rule to be a clear violation of the 1971 injunction. The 1971 injunction explicitly forbade the involuntary attribution of child support income to a family in which some children received adequate child support income and some received only AFDC. "When the state defendants began to deny AFDC applications and to reduce or terminate benefits under the SFU regulations, they were still obligated under court order to provide such benefits, regardless of whether or not a caretaker/applicant had assigned the child support rights of selected children to the state," the court stated. Memorandum of Decision, State J.S. at A-79. The change in the legislative and federal

regulatory background due to the passage of the Deficit Reduction Act did not absolve the state "of its duty to seek relief from the outstanding injunctions before acting in direct violation of it." Id. at A-78. As a result of this finding, the court ordered the state defendants to pay to all affected class members the benefits they would have received but for the state's actions in defiance of the 1971 injunction. The court held that the Eleventh Amendment did not relieve the state of its obligation to pay the plaintiffs the benefits withheld.

Having found the state to have acted in violation of its past orders, the court examined the statutory and regulatory changes to determine if the state should be given prospective relief from the injunction. The court found that it should not. Although urged by the plaintiffs to read the statute to avoid the constitutional dilemmas it presents, the court was unable to find textual or historical support for the argument that Congress intended for the income of the siblings of the AFDC children to be counted as income only if it could legally be and were actually being shared. It found instead that Congress acted on the basis of a legislative presumption that the child support paid for one child in the family is actually and legally available to all the children in the household.

In order to make this legislative presumption effective, the court ruled, Congress must have pre-empted "that portion of state child support laws that makes the child

support money the exclusive property of the child in whose name the child support order was issued or in whose name the money was voluntarily delivered." Id. at A-40. Unless this were the case, the state would be requiring an AFDC mother to violate the state's child support laws in order to obtain AFDC for her other children. Id. at A-44.

This pre-emption of the state's child support laws results in a distinct loss of private property by the supported child. "The selective pre-emption of state law," the court held, "represents an unconstitutional taking that deprives the children of their entitlement to child support simply because they live with a needy mother and half-siblings." Id. at A-54. Before the standard filing unit amendment went into effect, the affected children had claim to the entire amount of the child support paid for them. As a result of its enactment, however, the children lose the unrestricted access to the money. They must make it available to their brothers and sisters through the assignment system, and retain the unqualified claim to only $50 of the money.

The District Court rejected the argument of the defendants that there can be no taking because AFDC is a voluntary program. The court recognized that the child subject to the loss makes no independent choice to participate in the program, as his inclusion in the AFDC unit is automatic if his caretaker applies for AFDC for needy half-siblings. The mother's options are illusory, at best,

as her choice to preserve the rights to child support of one child cuts her other children off from their sole source of support, AFDC.

In addition to analyzing the statute as pre-empting state law and thereby accomplishing a taking of private property, the court examined the statute from an alternative premise: that Congress had not accomplished a pre-emption. Even if there were no pre-emption, the Court ruled, the statute offends both the Equal Protection and Due Process Clauses of the Constitution. These constitutional violations arise because of the government's direct interference with the private property of certain children based on their family living arrangements. It is not all recipients of child support who must surrender their income to reduce the federal deficit, the court found, it is only those recipients who live in a household with needy children who rely on AFDC for their survival. The court distinguished this classification, which causes a loss of private property to non-welfare recipients from a classification representing a government choice among different groups of needy individuals all requesting government benefits. It thus rejected the defendants' reliance on cases such as Dandridge v. Williams, 397 U.S. 471 (1970) and Schweiker v. Hogan, 457 U.S. 569 (1982). Perceiving that the interception of the private support based on a child's family living arrangements bore more resemblance to the harm redressd in Moore v. City of East Cleveland, 431 U.S. 494 (1977), the court

found direct support in that case for its imposition of a level of scrutiny more rigorous than that applied in the line of welfare cases cited by the defendants. Applying that more exacting standard to the invasive process chosen by the government to accomplish its deficit reduction objective, the court held the statute could not stand. "The Constitution's consistent recognition and protection of family associational rights prevent the state and federal governments from using children's unchosen membership in a family that includes AFDC dependent half-sisters and brothers as the justification for the deprivation of property." Id. at A-77.

Upon these findings, the court enjoined both federal and state defendants from further enforcement of the standard filing unit rule. From this ruling, both parties appealed.

ARGUMENT

A. THE COURT SHOULD NOTE PROBABLE JURISDICTION OF THE FEDERAL APPEAL AND OF QUESTION 1 OF THE STATE APPEAL.

A summary affirmance of the district court decision in this case would require all lower courts to declare Section 402(a)(38) of the Social Security Act unconstitutional. Because of the inappropriateness of invalidating an Act of Congress without full briefing and argument, this Court ordinarily notes probable jurisdiction in appeals such

as this.[4] Although appellees believe that the district court correctly disposed of the constitutional issue below, the issues presented by the federal appeal, and by question number 1 in the state appeal, are undeniably of sufficient substance and importance to preclude summary disposition. Accordingly, we believe the Court should note probable jurisdiction in the federal appeal (No. 86-506) and with regard to question number 1 in the state appeal (No. 86-564).

The issues presented by the merits of this controversy are substantially broader and more complex than suggested by the federal and state appellants. The threshold question which this Court will be required to resolve is whether section 402(a)(38) of the Social Security Act authorized or required the federal and state appellants to treat as available to an entire family all support payments made to a particular child, regardless of whether or not those support funds were in fact, or could legally be, used for the support of the entire family. The District Court construed section 402(a)(38) to mandate this constitutionally suspect practice, as have seven other district

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[4] This Court heard seven such cases in the October, 1985 term. Bowsher v. Synar, 92 L.Ed.2d 583 (1986); Bowen v. Public Agencies Opposed to Social Security Entrapment, 91 L.Ed.2d 35 (1986); Department of Treasury v. Galioto, 91 L.Ed.2d 459 (1986); Lyng v. Castillo, 91 L.Ed.2d 527 (1986); Bowen v. Owens, 90 L.Ed.2d 316 (1986); United States v. Hemme, 90 L.Ed.2d 538 (1986); Bowen v. Roy. 90 L.Ed.2d 735 (1986).

courts.[5] Another four district courts, however, have interpreted section 402(a)(38) in a manner that avoids all constitutional problems, holding that the statute authorizes officials to treat as available to an AFDC family only those child support payments which could lawfully be and were in fact used to support the AFDC family.[6]

If this Court adopts the interpretation of section 402(a)(38) accepted by the District Court in this case, the Court will be required to decide whether the statute as thus construed is unconstitutional on its face. At least four district courts, including that in the instant case, have held that section 402(a)(38) effects an unconstitutional taking or violates the Tenth Amendment, the Due Process Clause of the Fifth and Fourteenth Amendments, or the Equal

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[5] Maryland Dept. of Human Resources v. U.S. Dept. of Health and Human Services and Britt v. Bowen, Nos. M-86-605 and M-86-604 (D. Md. Apr. 22, 1986) consolidated apeals docketed, Nos. 86-3076 and 3083 (July 2, 1986, 4th Cir.) Rosado v. Bowen, No. H-85-171 (JAC) (D. Conn. Sept., 1986; Sherrod v. Hegstrom, 629 F. Supp. 150 (D. Or. 1985); Shonkwiler v. Heckler, 628 F.Supp. 1013 (S.D. Ind. 1985) Childress v. Heckler, No. 85-Z-1459 (D. Colo. Jan. 21, 1986); Baldwin v. Ledbetter, No. C85-4340A (N.D. Ga.) (Oct. 17, 1986) Lesko v. Bowen, 639 F. Supp. 1152 (E.D. Wis. 1986) appeal pending No. 86-415 (U.S.).

[6] Gorrie v. Heckler, 624 F. Supp. 85 (D. Minn. 1985) appeal pending No. 85-5394-MN (8th Cir.); White Horse v. Heckler, 627 F.Supp. 848 (D.S.D. 1985) appeal pending Nos. 85-5005, 85-5006SD (8th Cir); Lee v. Pingree, No. 85-644-Civ-T-13 (M.D. Fla. Feb. 13, 1986); Gibson v. Sallee, No. 3-85-1283 (M.D. Tenn. Mar. 6, 1986).

Protection Clause of the Fourteenth Amendment.[7] Another five district courts, on the other hand, have upheld the constitutionality of the statute in the face of such an across the board challenge.[8]

If the Court concludes that section 402(a)(38) is constitutional on its face, the Court will nonetheless have to determine whether the statute is unconstitutional as applied to the particular appellees in this case. The somewhat different circumstances of the named appellees present several distinct constitutional problems. Some appellees, such as Joyce Miles, were receiving child support as a result of judicial decrees which require that the support payments be spent only on the supported child; the actions of the defendant officials in this case, requiring Ms. Miles and others similarly situated to violate such court orders in order to obtain AFDC for their other children, offend basic due process principles. Another group of AFDC recipients, such as Arvis Waters, are subject to similar court orders from state courts outside of North Carolina; the attempts by North Carolina officials to induce violations of those out-of-state decrees raise serious questions under the Full Faith and Credit Clause. Finally,

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[7] Johnson v. Cohen, No. 84-6277 (E.D. Pa. Jan. 10, 1986) appeal pending, Nos. 86-1101, 86-1107, 86-1149 (3rd Cir.); Lesko v. Bowen, supra n.5; Baldwin v. Ledbetter, supra n.5.

[8] Maryland Dept. of Human Resources v. U.S. Dept. of Health and Human Services, supra n.5; Rosado v. Bowen, supra n.5; Sherrod v. Hegstrom, supra n.5; Shonkwiler v. Heckler, supra n.5; Childress v. Heckler, supra n.5.

class members, such as Dianne Thomas, entered into private agreements prior to October, 1984, pursuant to which the fathers involved promised to make certain support payments, and the mothers agreed in turn to expend the funds only on the specified children. State efforts clearly intended to force mothers to violate those pre-existing contractual agreements raise significant problems under the Contract Clause. Thus, even if section 402(a)(38) is held constitutional in some situations, the statute may nonetheless be ruled invalid in other circumstances.

B. QUESTION TWO OF THE STATE APPEAL IS INSUBSTANTIAL.

The District Court below found that the actions taken by the state defendants between 1984 and 1986 were not only unconstitutional, but also violated the injunction that had been issued by that court fifteen years earlier in December, 1971.[9] The 1971 injunction forbade the state defendants from withholding or reducing a family's AFDC payments because of child support payments to one child, unless the funds were "legally available to all members of the family group." State J.S. at A-110. The state appealed that injunction to this Court, which summarily affirmed it

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[9] The full text of the 1971 injunction is set forth in the State J.S. A-108 thru 112.

in 1972. 409 U.S. 807. In 1986, the District Court concluded that the state practices that had commenced in October, 1984, violated the commands of that 1971 injunction. State J.S. at A-77 thru A-80. The state did not deny in the proceedings below that it had violated the 1971 injunction, and does not seriously do so here.[10]

The district court correctly concluded that it had both the power and the duty to direct the state to return to the appellee class members funds that had been taken or withheld in violation of the 1971 injunction. In Hutto v. Finney, 437 U.S. 678 (1978), this Court held that the Eleventh Amendment did not confer upon the states a license

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[10] The defendants clearly recognized that implementation of the standard filing unit rule would conflict with the outstanding injunction. In a departmental memorandum issued two months prior to the implementation of the policy, the defendants noted, "The effect of this law on Guilliard [sic] will depend on whether or not the new law supersedes the court order. If it does, Guilliard would be voided. If not, the state would be placed in much the same position as exists in Alexander v. Hill, i.e., either comply with a court order and lose compliance with Federal regulations, or vice versa." See State J.S. at A-79.

In its Jurisdictional Statement, the state suggests it was "in effect ... following the original 1971 injunction" because the purpose of the injunction was to compel obedience to the Social Security Act as then written. State J. S. at 15. The actual terms of the injunction itself, however, neither referred to nor incorporated the Act, but simply forbade in unequivocal language the income counting practice resumed by the state in 1984.

to violate with impunity injunctions issued by the federal courts:

> In exercising their prospective powers under Ex parte Young ..., federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties ... which compensat[e] the party who won the injunction for the effects of his opponent's noncompliance.... The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail.

437 U.S at 691. Hutto makes clear that a court's authority to issue a prospective injunction necessarily includes the power to correct the effects of subsequent violations of such an injunction.

Regardless of this Court's disposition of the dispute regarding section 402(a)(38), the corrective provisions of the July 3, 1986 order should be upheld. Paragraphs 4-15 of that order were based, not on the lower court's views as to the meaning and validity of section 402(a)(38), but on its holding that the state "chose to defy the operative [1971] injunction." Memorandum of Decision, State J.S. at A-79. Even if, as the appellants contend, the enactment of section 402(a)(38) has undermined the rationale of the 1971 injunction, that does not excuse state officials from their obligation to obey that earlier decree until it is stayed,

vacated, withdrawn or reversed. See Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

This Court has repeatedly held that a party which deliberately violates an injunction cannot escape the consequences of that injunction by arguing that the injunction at issue was improper or even unconstitutional. Sheet Metal Workers v. EEOC, 92 L.Ed.2d 344, 366 n. 21 (1986) and cases cited. "An injunction duly issuing out of a court of general jurisdiction ... and served upon persons made parties therein ... must be obeyed by them however erroneous the action of the court may be." Howat v. Kansas, 258 U.S. 181, 189-90 (1922). This Court has held that neither striking coal miners, Howat v. Kansas, nor civil rights demonstrators, Walker v. Birmingham, 388 U.S. 307 (1967), can escape sanctions for violating such an injunction by asserting that the injunction had been mistakenly ordered. Nothing exempts government officials from the obligation to obey an injunction with which they may disagree until and unless that injunction has been modified or rescinded.

In this case the state argues that it was entitled to pursue just such a course of deliberate defiance of the 1971 injunction because the 1971 injunction was based on the Social Security Act as it stood in that year; the state appellees ask this Court to hold that state officials were free to disregard the 1971 injunction as soon as section 402(a)(38) was adopted in 1984, and were under no obligation to petition the Court for a modification of the old

injunction. State officials in fact made no effort to seek any such modification prior to October 1984, when they began systematically to violate the decree, even though the 1984 amendment had been adopted five months earlier. Nor did the state take immediate action to request an alteration of the decree even after appellees complained to the court in May 1985 that the defendants were "in blatant disregard of ... the extant [1971] court order." Memorandum of Law in Support of Plaintiffs' Motion for Further Relief, p. 2 (May 1985). Although the state finally filed a motion for relief from the 1971 injunction, almost a year after it began to violate that order, the state has never asked either the District Court or this Court to stay the 1971 injunction while that motion is under consideration. Today the 1971 injunction remains in effect, unaltered and unstayed, and the state defendants persist, as they have for the past two years, that they have no obligation to abide by it.[11] This

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[11] The state defendants did petition the District Court to stay its Final Order of July 3, 1986 pending appeal to this Court. The District Court granted the Motion in part, allowing them to postpone compliance with the payment portions of the Order. The Notice portions were not stayed. See Order of August 25, State J.S. at A-148 thru 151. The state did not ask the District Court to stay the 1971 injunction, and the August 25 Order did not state that the 1971 injunction was stayed. If this Court were to reverse the District Court's decision regarding the constitutionality of Section 402(a)(38), the state would be free to argue on remand that its obligation to obey the 1971 injunction terminated with the August 25 stay order. Should that issue arise, it would be for the District Court to decide it in the first instance; the question of the effect of the stay is not ripe for decision in the instant appeal.

Court should summarily reject the state's suggestion that state officials, unlike all other citizens, may simply ignore orders of this Court and of a lower federal court whenever they think those orders are legally unsound.

Although paragraph 14 of the July 3, 1986 decree directs the federal defendants to pay their appropriate share of any benefits withheld in violation of the 1971 decree, Final Order, State J.S. at 127, the United States does not challenge the correctness of this order. As a practical matter, the federal defendants will be obligated to pay 67% of all AFDC benefits that were improperly withheld. See 42 U.S.C. § 603. Although the federal appellants, like the state appellants, contend that the 1971 decree should have been modified in 1984 in light of the enactment of section 402(a)(38), the Solicitor General properly declines to argue that state officials were for that reason free to simply ignore, as they did, an injunction that had earlier been fully litigated before a three-judge federal court and upheld unanimously by this Court.

The disputed portion of the July 3, 1986 decree, unlike the issues raised by section 402(a)(38), are of limited practical importance. North Carolina appears to be the only state in which there was such an injunction in effect prior to 1984. Even in North Carolina, paragraphs 4-15 of the decree will have no long-term impact, since they will apply only to individuals whose rights under the 1971 injunction were violated between October 1984 and this Court's final decision on the DEFRA issue. The only other

lower court to deal with a similar problem concluded, as did the court below, that the Eleventh Amendment permits restoration of funds taken or withheld in violation of an outstanding injunction. Daubert v. Percy, 713 F.2d 328 (7th Cir. 1983).

For these reasons, the Court should dispose summarily of the issue raised by question number 2 of the state's Jurisdictional Statement, and limit plenary consideration to question number 1. If probable jurisdiction is noted with regard to question number 2, appellees will urge the Court to overrule Hans v. Louisiana, 134 U.S. 1 (1890).

CONCLUSION

For the above reasons, the Court should note probable jurisdiction in No. 86-509, the federal appeal, and in No. 86-564, the state appeal, limited to question number 1. If the state's appeal is limited to question number 1, we would urge that the cases be consolidated for oral argument.

Respectfully submitted,

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